# INDEX



## CITATIONS





85777—38——1

# In the Supreme Court of the United States

OCTOBER TERM, 1938

---

No. —

THE UNITED STATES OF AMERICA, PETITIONER

*v.*

ALGOMA LUMBER COMPANY, A CORPORATION

---

No. —

THE UNITED STATES OF AMERICA, PETITIONER

*v.*

FORREST LUMBER COMPANY, A CORPORATION

---

No. —

THE UNITED STATES OF AMERICA, PETITIONER

*v.*

LAMM LUMBER COMPANY

---

## PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The Acting Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Court of Claims in the above-entitled cases.

## OPINIONS BELOW

The opinions of the Court of Claims are not yet officially reported.

## JURISDICTION

The judgments of the Court of Claims were entered January 12, 1938. Motions for new trials were overruled on May 2, 1938. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether contracts, made pursuant to Section 7 of the Act of June 25, 1910 (U. S. C., Title 25, Sec. 406), and the regulations issued thereunder, which provide for the sale of standing timber on unallotted lands of an Indian tribe and which designate the Indians as vendors of the timber, are contracts of the United States, cognizable by the Court of Claims under section 145 of the Judicial Code.

2. Whether contracts for the sale of standing timber on land allotted to individual Indian allottees, made by such allottees pursuant to Section 8 of the Act of June 25, 1910 (U. S. C., Title 25, Sec. 407), and regulations issued thereunder, are contracts of the United States, cognizable by the Court of Claims under Section 145 of the Judicial Code.

## STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, p. 15.

## STATEMENT

These three cases arose out of the alleged breach of contracts for the sale of timber on certain unallotted and allotted Indian lands in the Klamath Reservation in Oregon. The cases arose at the same time and place and involve the same questions of law. They were considered together and judgments were entered at the same time. The court cited the decision in the Forrest Lumber Company case as the authority for the determination of the Algoma Lumber Company and the Lamm Lumber Company cases. However, the United States has treated the Algoma Lumber Company case as the test case and it contains the most comprehensive findings of fact. Accordingly, in connection with this petition the facts in that case alone will be referred to, and the references to findings of fact will be to those made in the Algoma case, except where the context indicates references to the other cases. A determination of the applicable question of law in any one case will be determinative of the other two cases.

The respondent, the Algoma Lumber Company, pursuant to advertisement and bids, entered into a contract on July 28, 1917, for the purchase of timber from certain designated lands in the Klamath Reservation. The contract was approved by the Secretary of the Interior on September 14, 1917 (Fdg. 5). In addition to providing for the sale of timber from unallotted tribal lands, it also stated

that certain allotted lands were located in the area described and authorized the respondent to contract with the Indian allottees for the purchase of standing timber on such allotted land (Fdg. 5). Thereafter the respondent entered into contracts with the several allottees and those contracts were duly approved by the Secretary of the Interior or the Commissioner of Indian Affairs (Fdg. 21).

The contracts provided that the stumpage rates were to be fixed for three-year periods by the Commissioner of Indian Affairs but that any increase in such rates should "not exceed fifty percent of the increase in the average mill run wholesale net value of lumber * * * during the three years preceding January 1 of the year in which the new prices are fixed" (Fdg. 5).

The court below found in substance that as of April 1, 1928, the Commissioner of Indian Affairs increased the stumpage rate by forty cents per thousand, contrary to the terms of the contract. The respondent duly protested but was compelled to pay, during the years 1928, 1929 and 1930, the additional sum of $25,094.56, which represented the increase in price of forty cents on the stumpage rates for the timber cut by the respondent during those three years.[1]

---

[1] In the Forrest Lumber Company case the increased cost as the result of the 40 cents advance in prices between April 1, 1928, and April 1, 1930, amounted to $44,772.62 (Fdg. 17, Forrest case). In the Lamm Lumber Company case the amount of increase stumpage paid between April 1, 1928, and April 30, 1929, amounted to $12,126.39 (Fdg. 20, Lamm case).

The court below also found (Fdg. 21) that the contract for the sale of the timber on the Indian reservation involved herein was authorized by Sections 7 and 8 of the Act of June 25, 1910, and the regulations promulgated by the Secretary of the Interior pursuant to such Act; that the Department of the Government engaged in the administration of Indian Affairs has always treated the Indian forests as private property held in sacred trust by the United States for the Indians; that on some reservations the merchantable stand of timber was practically the only source of revenue from which the cost of social and industrial betterments of the Indian tribe could be met; that the form of contract involved in the instant case has been used in every sale of timber on the Indian reservations since the passage of the Act of June 25, 1910; that prior to the Act of June 25, 1910, contracts for the sale of timber from unallotted lands were substantially similar in form to the present contract so far as relates to the parties thereto; that tribal and allotment contracts were made and administered as if only one contract were involved; but that all contracts for the purchase of timber on allotments held by individual Indians were made with the holders of such allotments and that contracts for the sale of timber on unallotted or allotted lands within Indian reservations have always been considered by the purchasers of timber and by the administrative department concerned to be contracts made for the respective tribal or individual Indians desig-

nated therein and such contracts have been made under the supervision of the Secretary of the Interior and specifically the Commissioner of Indian Affairs for the sole benefit of either the tribe or individual Indians concerned.

The proceeds from the sale of such timber were paid to the Superintendent of the Indian School and the amounts received by him, less 8 per cent deducted and used to defray the cost of administering the contracts and the Indian forests, were deposited either in private state banks or in the Treasury of the United States to the credit of the tribal or individual Indians concerned (Fdg. 23). No part of the beneficial income from the sale of timber on Indian reservations accrued to the benefit of the United States (Fdg. 24). The proceeds of sale of the timber have always been treated as belonging to the Indians, either tribal or individual, and not as public money of the United States (Fdg. 24).

In April, 1931, the respondent filed suit in the Court of Claims to recover from the United States the amount representing the increase of 40 cents in stumpage rates for the timber cut by the respondent during 1928, 1929 and 1930. On June 12, 1934, the United States filed a plea to the jurisdiction asserting that the Court of Claims lacked jurisdiction to entertain a suit of this character. The plea was overruled and on a hearing on the merits the Court of Claims held that it had jurisdiction to entertain suit and entered judgment for the respondent.

## SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In taking jurisdiction of the instant case.

2. In holding that a contract for the sale of timber on tribal lands executed by the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, and approved by the Assistant Secretary of the Interior wherein the Indian tribe is named as the vendor, is a contract of the United States cognizable by the Court of Claims under Section 145 of the Judicial Code.

3. In holding that the several contracts entered into by individual Indian allottees for the sale of standing timber and approved by the Secretary of the Interior, are contracts of the United States cognizable by the Court of Claims under Section 145 of the Judicial Code.

4. In holding that all of the contracts involved in these three cases were contracts of the United States.

5. In failing to find separately the excess costs resulting from the increase of 40 cents per M in respect of the timber cut on allotted land as distinguished from that cut on unallotted land during the years in which such increase was in effect.

6. In entering judgment for the respondent against the United States.

REASONS FOR GRANTING THE WRITS

The court below has decided an important question of Federal law relating to the jurisdiction of the Court of Claims in a way which has never been, but should be, settled by this Court, and which is probably untenable in the light of prior decisions of this Court dealing with the status of the United States with respect to Indian lands.[2]

(1) None of the contracts upon which judgment was entered was a contract with the Government of the United States.

None of the contracts was entered into for or on behalf of the United States. No obligation was specified in any of them which the United States was required by the terms of the contract or by implication to perform, and none which the United States could perform. The United States was not entitled to receive, nor did it receive, the beneficial interest in any of the proceeds of the respondents' performance. The contracts were all made either by or on behalf of the Indians, disposed of the Indians' property and required the respondents to make payments for and on behalf of the Indians. Substantially all of the proceeds were deposited to the credit of the Indians and the balance was applied to defray the expenses of administering their property. Yet the Court of Claims, having observed that the officials who approved these con-

[2] *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *United States* v. *Shoshone Tribe*, Oct. Term, 1937, No. 668, decided April 25, 1938.

tracts (and, in the case of the unallotted lands, executed them on behalf of the Indian tribe), were acting under laws of the United States rather than under authority conferred upon them by the Indians,[2] concluded without further analysis that they were not agents of the Indians and consequently that "undoubtedly the contract is a contract of the defendant", the United States. It is submitted that this conclusion is in error, that it disregards the significance of the absolute lack of substantial obligation of the United States or benefit to the United States under these contracts and that it imposes upon the United States a burden which neither the logical nor the practical relation of the United States to these transactions requires.

Since 1871 the United States has discontinued the policy of dealing with the Indians through treaties and has undertaken by direct legislation to aid them in the management of their property.[3]

However, it is clear that while the United States has retained the legal title to unallotted Indian property, nevertheless the Indians have been the sole and complete beneficial owners of such property and the timber on it and the estate which they possess is superior to that of the United States. *United States* v. *Shoshone Tribe, supra.*

The relationship between the United States and the Indians has frequently been described as some-

---

[2] *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, 498.

what similar to that of guardian and ward, and the United States has sometimes been referred to as the trustee of the property of which its Indian wards are the beneficial owners. The authority which the United States retains and exercises with respect to Indian property is merely that required for the more convenient discharge of its duty to supervise the management of such property. The court below, although suggesting that the United States acted "somewhat in the manner that a guardian might act for a ward" fails to state any reason for its conclusion from this vaguely expressed analogy that the United States is the contracting party, and, as such, is responsible in damages to repay amounts which not the United States but the contracting Indians received under the contract.

The contract with respect to the unallotted lands recites on its face that it was entered into by the Superintendent of the Indian School of the Klamath Tribe for and on behalf of that tribe and it was executed in like manner. In these circumstances it is apparent that the contract here under discussion was entered into by the Indian tribe pursuant to law and that the contract was the contract of the tribe.[4] It was in no sense a contract

[4] Section 7 of the Act of June 25, 1910, authorized the sale of timber on Indian lands under regulations to be prescribed by the Secretary of the Interior. The contract in the instant case was made pursuant to such law and regulation.

of the United States.[5] It was approved by the Secretary of the Interior but approval by the Secretary does not make him a party to the contract. *Jennings* v. *Wood*, 192 Fed. 507, 508 (C. C. A. 8th).

Nor does the fact that the Commissioner of Indian Affairs was empowered to determine the stumpage price during the life of the contract change its character. Obviously it is permissible for the parties to a contract to designate a third individual to determine the value of the goods delivered under a contract. Such a designation neither makes that person nor his principal a party to the contract and the court below does not appear to rely upon that circumstance to sustain its conclusion.

From the terms, the form, and the substance of the contracts in these cases it is apparent that the Indians themselves were the vendors of the timber and that the Superintendent was acting under the law and regulations as their agent to manage the matter for them. We respectfully submit, therefore, that the contracts are not contracts of the United States, but contracts of the Klamath Indians and that Section 145 of the Judicial Code confers no jurisdiction upon the Court of Claims to entertain a suit of this nature.

The court has failed to notice any distinction between the contracts for the sale of timber from un-

---

[5] See unpublished opinion of Assistant Attorney General Cobb, *infra*, pp. 6–17.

allotted lands and those for the sale of timber from allotted lands. Yet they are significantly different. What has been said above applies with a particular force to the contracts made by individual Indians for the sale of timber on allotted lands.

Section 8 of the Act of June 25, 1910, provides that timber on such lands may be sold by the Indian allottees. In these cases the timber on the allotted land was so sold. Even if the contracts with respect to the unallotted lands should be construed as contracts of the United States because the Superintendent in executing them on behalf of the Indians acted under authority conferred by law (which, as far as is apparent, is the sole reason upon which the court below rested its decision), no basis whatever is apparent upon which the contracts made by the Indians themselves, disposing of timber of which they alone, as individuals, were the beneficial owners, could be held to be contracts of the United States. It is true that the Secretary of the Interior was required to approve the contract but this waiver of his power to disapprove the sale is clearly incapable of being construed to be the assumption of the affirmative obligations of a contracting party, whatever the execution of the contracts concerning the unallotted lands might be construed to be. *Jennings* v. *Wood, supra.*

Accordingly, even if the decision of the court below might be sustained as to the contracts for timber from the unallotted lands, it is clearly erroneous

with respect to contracts made by the individual Indians for the sale of timber from allotted lands.*

(2) The question of jurisdiction of the Court of Claims involved in these cases is of great importance.

Thousands of contracts have been made involving the disposition of tribal and individual Indians' property. Such contracts relate not only to timber but also to the exploitation of mineral resources and the use of Indian lands for farming and grazing. Notwithstanding the long period of time during which contracts of this character have been made, this is the first instance, so far as we have been able to determine, in which a suit has been maintained on such a contract under Section 145 of the Judicial Code. If the United States should be held subject under that Act to actions based upon contracts relating to Indian property a vastly increased field of litigation would be opened and the supervision by the United States of the management of Indian property would be seriously affected. There is no provision of law whereby money collected on behalf of the Indians may be either recovered or retained by the Unitd States as reimbursement for any judgment paid by it in such

* The court below failed to find the proper amounts allocable to the allotted and unallotted lands, respectively. Should this Court determine that the court below erred in respect to allotted lands only, the case should be remanded with directions to find the precise amount chargeable to the tribal lands.

a suit. In view of the burden which the maintenance of such actions would throw upon the United States to pay claimants, out of general funds, damages equivalent to amounts already paid to the Indians, it seems obvious that clearer and more explicit language than any in the existing statutes, and stronger reasons than the negative ones stated by the court below, are necessary before such liability should be sustained.

## CONCLUSION

The decision of the court below is incorrect and the question involved is of such general importance as to require an authoritative ruling by this Court. Wherefore, it is respectfully submitted that this petition for writs of certiorari should be granted.

N. A. TOWNSEND,
*Acting Solicitor General.*

AUGUST 1938.

## APPENDIX

Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250) provides in part as follows:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) *Claims against United States.*—First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, * * *.

The Act of June 25, 1910, c. 431, 36 Stat. 855, 857 (U. S. C., Title 25, Sec. 406, 407), provides in part as follows:

> SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided,* That this section shall not apply to the States of Minnesota and Wisconsin.
>
> SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

APR 17 1912

SECRETARY OF THE INTERIOR.

SIR: A letter from the Commissioner of Indian Affairs has been submitted, for opinion as to whether contracts for the sale of timber under authority of section 7 of the act of June 25, 1910 (36 Stat., 855), and the regulations of June 29, 1911, must be filed in the Returns Office of the Department of the Interior as contracts made on behalf of the United States within the purview of section 3744, Revised Statutes. The provisions of said act of June 25, 1910, *supra*, are as follows:

"SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin.

"SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienation, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior."

This office, by opinion of June 13, 1910, advised that contracts for the sale and removal of timber, subject to approval by the Department, are not of the character of contracts required by section 3744, Revised Statutes, to be filed in the Returns Office of the Interior Department. That opinion

had reference to sales of timber under section 8 of said act.

There is no material difference in the character of the contracts, whether the timber is sold under authority of section 7 or section 8 of the act. In the one case, the contract is made by the Secretary of the Interior approving a proposal for purchase of the timber and, in the other case, by a formal contract by the Indian, with the purchaser, approved by the Secretary of the Interior, or by some officer authorized by him. In both cases, however, it is a contract of sale for the sole benefit of the Indian, made under the supervision of the Secretary of the Interior.

While the validity of such contracts depends upon the approval of the Secretary of the Interior, they are solely for the benefit of the Indian and are in no wise contracts made "on behalf of the Government", and are not of the character of contracts which are required by said section 3744, Revised Statutes, to be filed in the Returns Office.

Very respectfully,

(Signed) CHARLES W. COBB,
*Assistant Attorney General.*

U. S. GOVERNMENT PRINTING OFFICE: 1938